Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

LAKE CHARLES STEVEDORES, INC.,

Petitioner,

versus

PROFESSOR VLADIMIR POPOV MV, *in rem,*

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeal For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a subcontractor (in this case a stevedore) (i) whose identity is known by the vessel owner prior to performance of the subcontractor's services; (ii) who, in this instance, performed 100% of the services provided; (iii) whose work was inspected by the vessel owner during performance of the work; (iv) whose work was both provisionally and finally accepted by the vessel owner; and (v) for whose work the general contractor was fully compensated, have a maritime lien?

In the Eleventh Circuit, in these circumstances the stevedore subcontractor's work would be deemed to have been "authorized" by the vessel owner under the Maritime Commercial Instruments and Liens Act ("MCILA") 46 U.S.C. §31341 and §31342, and the stevedore would have a lien. In the Fourth, Fifth and Ninth Circuits, such work would not be considered "authorized" by the vessel owner and there would be no lien.

2. Is a stevedore now required to investigate the terms of the contract for the sale of the cargo to determine (i) whether it is FOB or FAS and (ii) the relationship of the cargo supplier to the vessel, i.e., whether it is a mere supplier, an agent or a charterer, and (iii) then attempt to reach a legal conclusion as to whether it has a lien, when the purpose of the 1971 amendments to the MCILA was to provide American suppliers of necessaries and necessary services with certainty as to whether or not they have a lien and to encourage the prompt furnishing of necessaries to vessels?

QUESTIONS PRESENTED – Continued

3. Has the FOB contract effectively become the equivalent of the "no lien" clause, with the associated problems, as matters stood prior to the 1971 amendments to the MCILA?

LIST OF PARTIES

The following are the parties to this proceeding:

1. E. D. & F. Man Sugar, Inc. – respondent;
2. Sugar Chartering, Inc. – respondent;
3. Lake Charles Stevedores, Inc. – petitioner*

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* Pursuant to Supreme Court Rule 29.6, petitioner, Lake Charles Stevedores, Inc., states it is a wholly owned subsidiary of Gulf Services, Inc. Lake Charles Stevedores, Inc. has no subsidiaries.

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DECISIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana is found at 1998 U.S. Dist. LEXIS 11969 and is reproduced in Appendix B (App. pp. 29-33). The opinion of the United States Court of Appeals for the Fifth Circuit is found at 199 F.3d 220 (5th Cir. 1999) and is reproduced in Appendix A (App. pp. 1-28).

JURISDICTION

On December 23, 1999, the United States Court of Appeals for the Fifth Circuit issued its opinion, dismissing petitioner's claim and affirming the judgment of the District Court. Petitioner now files its petition for Writ of *Certiorari,* pursuant to 28 U.S.C. §2101(c) and Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

The following provisions of the Maritime Commercial Instruments and Liens Act ("MCILA") are involved in this petition:

46 U.S.C. §31341:

Persons presumed to have authority to procure necessaries:

> (a) The following persons are presumed to have authority to procure necessaries for a vessel:

(1) the owner;

(2) the master;

(3) a person entrusted with the management of the vessel at the port of supply; or

(4) an officer or agent appointed by –

(A) the owner;

(B) a charterer;

(C) an owner *pro hac vice*; or

(D) an agreed buyer in possession of the vessel.

(b) A person tortiously or unlawfully in possession or charge of a vessel has no authority to procure necessaries for the vessel.

46 U.S.C. §31342:

Establishing maritime liens:

(a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner –

(1) has a maritime lien on the vessel;

(2) may bring a civil action *in rem* to enforce the lien; and

(3) is not required to allege or prove in the action that credit was given to the vessel.

(b) this section does not apply to a public vessel.

STATEMENT OF THE CASE

On April 24, 1997, Reid & Company ("Reid"), a freight forwarder, acting as an agent on behalf of Broussard Rice Mill, Inc. ("Broussard"), asked Lake Charles Stevedores, Inc. ("LCS") to submit a bid for loading a cargo of rice aboard a vessel in Lake Charles, Louisiana. LCS's bid was accepted by Reid, Broussard's agent, and LCS was authorized to use the vessel's gear to load the cargo.

As is often the case, there were numerous parties involved in the transaction. Although LCS knew that it was working for Broussard, it did not know Broussard's relationship to the vessel or the terms of the contract for the sale of the rice.

Although not known at the time of the incident, it was developed during discovery and at trial that through a series of charter parties, E. D. & F. Man Sugar, Inc., ("Man Sugar"), a subsidiary of E. D. & F. Man, Inc., obtained the use of the M/V PROFESSOR VLADIMIR POPOV to transport the rice. Savannah Chartering, Ltd., the disponent owner of the vessel, had time chartered the vessel to Marine Trading, Ltd. ("Marine Trading"). The charter party between Savannah Chartering, Ltd. and Marine Trading provided that:

> [t]he Captain (although appointed by the Owners), shall be under the orders and direction of the Charterers as regards employment and agency; and Charterers are to load, stow and trim, and secure the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading for the cargo presented, in conformity of mate's or tally clerk's receipts.

Marine Trading voyage chartered the vessel to Sugar Chartering, Inc., ("Sugar Chartering"), another subsidiary of E. D. & F. Man, Inc. That charter party provided that the stevedores were to be employed by Sugar Chartering. Sugar Chartering subchartered the vessel to Man Sugar. This case is being defended by the charterers rather than the owners, because *vis-a-vis* the owners, the charterers are responsible for stevedoring services.

Also unknown to LCS, Broussard sold the rice to E. D. & F. Man, Inc., "FOB[1] mill," meaning that the cost of loading the vessel was included in the sales price, and the stevedores were to be employed by the seller. LCS handled all of the rice shipped by Broussard at the port. Ninety-five percent of the shipments of Broussard's rice were FAS,[2] meaning Broussard was not responsible for loading the vessel, rather presumably as is customary, the charterer was. (Unquestionably, a maritime lien arose in the FAS shipments.) In fact, this shipment had indicia that it was FAS, as Broussard accurately told LCS it was receiving payment when the cargo reached the dock, not when it was loaded on the vessel.

Prior to the commencement of loading, LCS received instructions from the master regarding the loading of the vessel. The master's instructions were sent to LCS and E. D. & F. Man in care of Broussard's agent Reid, who was also the agent for the charterer. They were not sent to

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[1] "FOB," or "Free on Board" means the sales price includes the cost of loading the cargo on the vessel.

[2] "FAS," or "Free Along Side" means the sales price does not include the cost of loading the cargo on the vessel. The seller need only deliver the cargo along side the vessel.

Broussard at all. During the loading of the vessel, the stevedore was supervised, as is customary, by the vessel's mate. The vessel's crew opened the hatches to load the cargo. The vessel's mate or master signed LCS's activity sheets, which described and approved the work performed each day, as well as the mate's receipt which acknowledged the loading of the cargo aboard the vessel.

The stevedoring services were successfully completed and Broussard was paid by Man Sugar. However, Broussard failed to pay LCS for loading the rice and then went into receivership. LCS attempted to exercise its maritime lien on the vessel by instituting the instant *in rem* proceeding.

Had LCS been aware that it did not have a maritime lien, as was held by the District and Appellate Courts, LCS would never have loaded the vessel without payment in advance.

The uncontested testimony was that LCS "absolutely" believed it had the authority of the owners to load the vessel, as its stevedores were allowed to board the vessel without objection, received instructions from the master, were allowed to examine the gear certificate and used the vessel's gear. Moreover, the vessel's crew opened the hatches for the stevedores and the work was supervised and accepted by the chief officer and master.

REASONS FOR GRANTING THE WRIT

This case presents questions of extraordinary importance to U.S. materialmen, and in particular, stevedores

supplying necessary services to vessels. Prior to the opinion of the Courts below, the stevedore could rely on having a maritime lien to enforce payment for loading a vessel as envisioned by both the Maritime Commercial Instruments and Liens Act and years of jurisprudence. Should the decisions of the Courts below not be reversed, then contrary to both statute and jurisprudence, the stevedore now will have to investigate the contract for the sale of the cargo to determine whether the contract is FOB or FAS, and the nature of the relationship of the party with which it contracted to the vessel, i.e., whether that entity is considered a charterer or charterer's agent, and then attempt to come to a legal conclusion as to whether it has a lien. Essentially, the FOB contract has become the new "no lien clause" of the pre-1971 act and the Courts below once again have imposed the risk of loss along with the duty to investigate on the American materialman.

Further, the Fifth Circuit has treated LCS as a subcontractor of Broussard.[3] Under the jurisprudence of the Fourth, Ninth and now Fifth Circuits, a subcontractor in the position of LCS does not have a maritime lien as its services are deemed not having been authorized by the vessel owner. Contrarily, in the Eleventh Circuit, the services would be deemed authorized by the owner and a

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[3] LCS does not agree with the Fifth Circuit's characterization of it as a subcontractor. Rather, LCS believes that it was the contractor and Broussard merely a middle man obtaining the stevedoring services required by the vessel owner.

lien created. There is no indication this split in the Circuits, existing now for a decade, will be resolved without this Court's intervention.

1. The stevedoring services were "authorized" within the meaning of the statute.

It is undisputed that LCS's services were necessaries. The sole issue on which the appeal turned was whether the stevedoring services were authorized under MCILA provisions 46 U.S.C. §§31341 and 31342. The vessel's[4] position was "[I]t is also undisputed that the vessel owner is always **aware** that necessaries are going to be provided to the vessel, and in that sense, always **authorizes** the necessaries." Appellate Brief of vessel, p. 24 (emphasis in the original). However, the vessel maintained that Congress must have had in mind different "sorts" of authorization when it wrote the statute.

It is LCS's position that authorization is authorization in this remedial statute and that what Congress meant has been explained by this Court and results in a maritime lien here.

The Maritime Lien Act of 1910, as amended in 1920, 46 U.S.C. §971, *et seq.*, contains three relevant provisions. Section 971 provided for a lien in favor of "[a]ny person furnishing necessaries . . . to a vessel . . . upon the order

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[4] The vessel is the M/V PROFESSOR VLADIMIR POPOV, defendant *in rem*, for whom claim was filed by E. D. & F. Man, Inc. and Sugar Chartering, Inc., the charterers, not owners of the vessel.

of the owner . . . or a person authorized by the owner . . . and it shall not be necessary to allege or prove that credit was given to the vessel."

Section 972 provided, "The following persons shall be presumed to have authority from the owner to procure . . . necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted."

Finally, Section 973, in relevant part stated:

> The officers and agents of a vessel specified in Section 972 of this title shall be taken to include such officers and agents when appointed by a charterer . . . ; *but nothing in this chapter shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the . . . necessaries was without authority to bind the vessel.* (Italics added)

This Court interpreted the italicized language as creating an affirmative duty of inquiry on the part of the supplier to ascertain if the party ordering the necessaries was without authority to bind the vessel. *The South Coast*, 251 U.S. 519, 40 S.Ct. 233 (1920) and *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co. of California*, 310 U.S. 268, 60 S.Ct. 937 (1940).

In 1971, Congress, finding this situation unsatisfactory, deleted the language underlined by petitioner in Section 973.

The Fifth Circuit reviewed the legislative history and stated:

> Our review leads us inexorably to the conclusion that it was the intent of the Congress to make it easier and more certain for *stevedores* and others to protect their interests by making maritime liens available *where traditional services are routinely rendered.*

Atlantic & Gulf Stevedore, Inc. v. M/V GRAND LOYALTY, 608 F.2d 197, 201 (5th Cir. 1979). (Emphasis added) The Fifth Circuit, quoting the House Report on the statute, stated:

> Granting the materialman a lien encourages the prompt furnishing of necessaries to vessels so that they can be speedily turned around and put to sea. This is especially significant today when the emphasis on vessel performance is reduced port time and increased speed.

H. Rep. No. 92-340, 92nd Cong., 1st Sess., reprinted in (1971), U.S. Code Cong. & Admin. News, pp. 1363, 1365; *id.*

Congress specifically noted that when traditional services are routinely rendered to the vessel on authority of the owner, the risk of loss shifts to the owner:

> After careful consideration of the entire record, your Committee has concluded that, as a matter of equity, the owner should bear the loss in such a situation.
>
> As a practical matter, the owner can more easily protect himself contractually by bonds or otherwise at the time he charters the vessel, than can the American materialman who furnishes

> necessaries to a vessel under great economic pressure to put back to sea.

M/V GRAND LOYALTY, 608 F.2d at 202, n. 7, quoting 1971 U.S. Code Cong. & Admin. News, pp. 1364-1365.

Quite clearly, the purpose of the amendment was to vitiate the requirement that the supplier investigate whether or not the person ordering the necessaries was without authority to bind the vessel.

With the advent of the 1988 amendments, in which the Maritime Lien Act's name was changed to the MCILA, additional important changes were made. First, the term "ship's husband" (an agent appointed by the owner or charterer) was deleted from the list of persons presumed to have authority to procure necessaries. When section 31341(a)(4) listed as persons "presumed to have authority" the officers and agents of the owner and charterer, "ship's husband" became redundant.

However, section 31341(a)(3) was retained and still provides that "a person entrusted with management of the vessel at the port of supply" has authority to procure necessaries. It is a cardinal rule of statutory interpretation that a provision should not be construed so as to be rendered redundant or meaningless. *United States v. Menasche*, 348 U.S. 528, 538-539; 75 S.Ct. 513, 519-520 (1955). "[S]ignificance and effect shall, if possible, be accorded to *every word*. . . . " in a statute and " 'no clause, sentence, or word shall be superfluous, void, or insignificant.' " *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115-116, 25 L.Ed. 782, 783 (1879), quoting Bacon's Abridgement, sect. 2. (Emphasis added). This "entrusted person" in §31341(a)(3), therefore, obviously is not an officer or

agent of the owner or charterer, as that is provided for in subsection 31341(a)(4).

The opinion of the Fifth Circuit in this case is flawed, in that it ultimately concludes that "a person entrusted with management must be someone such as charterer or chief officer having direction and control for the purposes for which the vessel is used." *Lake Charles Stevedores, Inc. v. PROFESSOR VLADIMIR POPOV M/V, in rem*, 199 F.3d, 220, 226 (5th Cir. 1999), citing *Signal Oil, supra*. The flaw in the Fifth Circuit's reasoning is that a charterer and a chief officer are both parties listed in subsection 4, not subsection 3.

The Fifth Circuit misinterprets this Court's decision in *Signal Oil* and unnecessarily limits the meaning of the term "a person entrusted with management of the vessel at the port of supply." *Signal Oil* was decided prior to the 1971 amendments. As it then existed, the statute did not make clear that charterers were presumed to be authorized to bind the vessel. Apparently, the vessel owners attempted to argue that "management of the vessel" referred to her "navigation." *Signal Oil*, 310 U.S. at 279, 60 S.Ct. at 943. However, this Court replied, "management is a broader term connecting direction and control for the purposes for which the vessel is used." *Id.* This Court was attempting to suggest a broad reading of the provision regarding management rather than a narrow one and found that management included the time charterer of the vessel. Further, the statute refers not merely to management of the vessel, but speaks to the management of the vessel "in the port of supply." Although a charterer may manage the vessel for a certain period of time or for a specific voyage, obviously, entities other than agents

and officers, by proper statutory construction, may be entrusted with the management of the vessel at the port of supply.

Here, Broussard was entrusted with the direction and control of the primary purpose for which a merchant vessel is used, specifically, the loading of cargo for carriage aboard the vessel. The shipper/seller in an FOB contract, which requires that shipper to pay for loading the cargo, is clearly authorized (if not required) by the vessel interests, charterers and owners, to obtain stevedoring services to load the cargo aboard the owner's vessel. In the stevedoring contract here, Broussard authorized LCS to use vessel gear. Hatches were opened and closed by the vessel crew, instructions were received directly from the master, the daily loading was "approved" by the master, and the chief mate acknowledged receipt of the cargo from LCS.

The concluding reasoning of this Court in *Signal Oil* is directly applicable to the situation at hand:

> We are of the opinion that it would thwart the purpose of the statute to compel the material-man furnishing supplies to the vessel to resolve the ambiguities which may be found in such charters as those here involved. The statute was intended to afford the material-man a reasonably certain criterion. The owner has a simple and ready means of protection. All that is necessary for him to do . . . is to provide . . . that the creation of maritime liens is prohibited. When the owner does not do so, he should not be heard to complain when it appears that it is the charterer's business to obtain supplies to keep the vessel on her way and the charter has

> not prohibited reliance upon the credit of the vessel.

Signal Oil, 310 U.S. at 280-281, 60 S.Ct. at 943.

It is as much the business of a seller in an FOB contract to obtain stevedoring services to permit the vessel to perform its primary function, transportation of cargo, as it is the charterer's business to obtain supplies to keep the vessel on her way. Broussard's relation to the vessel was never clear to LCS. But even if it were clear that Broussard was not a charterer, Broussard still is a party authorized by the owner to obtain stevedoring services for the vessel. As in *Signal Oil*, the owner here had a "simple and ready means of protection," specifically, notifying the stevedore that there was no maritime lien and that Broussard was not authorized to bind the vessel.[5]

Jan C. Utierwyck Co., Inc. v. M/V MARE ARABICO, 459 F. Supp. 1325 (D. Md. 1978), cited with approval in *Atlantic & Gulf Stevedores, Inc. v. M/V GRAND LOYALTY*, 608 F.2d 197 (5th Cir. 1979), is on point. In *Jan C. Utierwyck*, an entity known as Beef and Produce Export Corporation ("Beef and Produce") was in the business of shipping cargo and was merely a space charterer. In its contract with the vessel owners, Beef and Produce was obligated to pay for the stevedoring services. It is likely, although not specifically stated in the opinion, that the contract was FOB vessel, as clearly neither the time charterer nor vessel owner was responsible for paying the stevedores.

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[5] Of course, the vessel owner would not have done this as LCS would not have loaded the vessel without a lien right.

What LCS contends, and what the court in *Jan C. Utierwyck* accepted, is that the nature of arranging for stevedoring services implies authority. *Jan C. Utierwyck*, 459 F. Supp. at 1330-1331 ("arrangements for these [stevedoring] services, must be made by the ship's master or someone authorized by him, or a representative of the charterer. . . . It is hardly the responsibility of a mere shipper to arrange for services necessary . . . to receive cargo.") It is because of this implied authority that the nature of stevedoring services itself requires in all but cases of illegality that the services be authorized by the vessel owner. This proposition does not render the qualifying provisions of 46 U.S.C. §§31341 and 31342 superfluous. For instance, if the stevedore had actual knowledge of the existence of a no lien clause and hence had actual knowledge that the person requesting its services did not have authority to bind the vessel, there would be no lien. However, under the statute it is the burden of the vessel owner to advise that a party is without authority to procure necessaries. It is not the burden of the supplier to obtain and read the contracts to ascertain who has authority and who does not.

As the Eleventh Circuit has stated:

> [I]t is reasonable to conclude that persons falling outside the class of persons presumed to have authority might still have had authority to procure [necessaries]; there merely is no presumption of such authority.
>
> Further, *prior* authorization by the owner to the party procuring [the necessaries] is not an essential prerequisite to preserving a lien position. *Atlantic & Gulf Stevedores, Inc. v. M/V*

> *GRAND LOYALTY*, 608 F.2d 197, 202 (5th Cir. 1979). . . . Instead, authorization, either actual or fairly presumed, given prior to or during performance of the services, or ratified subsequent to performance will suffice. *Id.*

Marine Coatings of Alabama, Inc. v. United States, 932 F.2d 1370, 1376 (11th Cir. 1991).

The performance of stevedoring services under an FOB contract is the quintessential example of services procured on the actual authority, or at least authority fairly presumed, of the owner or charterer. In an FOB contract, the charterer is not hiring the seller to perform stevedoring. Rather, the charterer is authorizing the seller to employ or hire stevedores to load the vessel. Absent actual knowledge of a prohibition of lien clause, it must at least be reasonable to fairly presume that the vessel interests have authorized the employment of stevedores.

2. There is a split in the Circuits as to when a subcontractor has authority from the owner to supply necessaries in order to give rise to a maritime lien.

A review of the detailed and thorough (albeit wrongly decided) opinion of the Fifth Circuit in this case below, *Lake Charles Stevedores, Inc.*, 199 F.3d at 229-231, summarizes the different approaches of the Circuits to this issue. In *Integral Controls System Corp., et al. v. Consolidated Edison Co. of New York, Inc., et al.*, 990 F. Supp. 295 (S.D.N.Y. 1998), Senior District Judge Haight (an experienced admiralty practitioner and jurist), finding that the "Second Circuit does not appear to have considered the existence *vel non* of a subcontractor's maritime lien" noticed the divergence between the Eleventh Circuit's

"more expansive approach" which he described as "outside the mainstream of American admiralty jurisprudence" and the more restrictive view of the Ninth Circuit. *Integral Controls*, 990 F. Supp. at 301. In *Port of Portland v. M/V PARALLA*, 892 F.2d 825 (9th Cir. 1989), the Ninth Circuit held that "[i]t is the general rule that a general contractor does not have authority to bind a vessel". *Port of Portland*, 892 F.2d at 828. In *Farwest Steel Corp. v. Barge SEA-SPAN 241*, 828 F.2d 522 (9th Cir. 1987), *cert. den.*, 485 U.S. 1034, 108 S.Ct. 1594 (1988), the court stated:

> [W]here subcontractor suppliers have sought maritime liens, courts interpreting section 972 have uniformly held that the general repair contractor was not endowed with sufficient "management" authority to support a section 971 lien.

Farwest Steel Corp., 828 F.2d at 526.

The Ninth Circuit apparently would make an exception if the owner orders the general contractor to retain a specific subcontractor. *Port of Portland*, 892 F.2d at 828.

The basis of this reasoning is that a contractor is not a party specifically listed as one authorized to bind the vessel. The Ninth Circuit's reasoning is followed by the Fourth Circuit, *South Carolina Ports Authority v. M/V TYSON LYKES*, 67 F.3d 59 (4th Cir. 1995) and the Fifth Circuit, *Crescent City Marine, Inc. v. M/V NUKI*, 20 F.3d 665 (5th Cir.), *reh. den.*, 1994 U.S. App. LEXIS 16248 (5th Cir. 1994).

On the other hand, in the Eleventh Circuit, where the vessel owners were aware of the subcontractor's performance (as was known in the instant case), where they

were aware that the contractor could not perform all of the activities itself (in this instance, it was stipulated that Broussard was not a stevedore, and hence, could not perform *any* of the loading activities), where the owner collaborated with the subcontractor in performing the work (here the master stipulated how the work was to be done and the work was supervised by the chief officer and approved daily) and the activities were accepted and fully compensated for by the vessel interests (as occurred here),[6] a maritime lien arises. *Stevens Technical Services, Inc. v. United States*, 913 F.2d 1521, 1534-1535 (11th Cir. 1990). The rationale underlying the Eleventh Circuit's opinion is that "Persons 'authorized by the owner,' §971, to procure . . . necessaries, is broadly defined in §972. . . . " and that the vessel interest's "participation [in the services provided by the subcontractor] eliminates any question of authority. . . . " *Stevens*, 913 F.2d at 1535. To the same effect are *Marine Coatings of Alabama, Inc. v. United States*, 932 F.2d 1370 (11th Cir. 1991); *Turecamo of Savannah, Inc. v. United States*, 36 F.3d 1083 (11th Cir. 1994), *cert. den.*, 516 U.S. 1028, 116 S. Ct. 673 (1995); *Riedel Environmental Services, Inc. v. M/V TULA*, 1987 AMC 2378 (S.D. Ala. 1987).

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[6] As in *The South Coast*, 251 U.S. 519, 40 S.Ct. 233 (1920), the fact that Broussard was obligated to pay for the services does not prevent the creation of a maritime lien. Just as the owners in *The South Coast* could not defeat the creation of a maritime lien by telling the supplier that the vessel was chartered and that the charterer was responsible for paying for supplies, neither can the charterer in this instance, by negotiating an FOB contract in which the supplier is required to pay for the stevedoring services, defeat the stevedore's maritime lien.

Application of the Eleventh Circuit's rule can also be found in *Galehead, Inc. v. M/V ANGLIA*, 183 F.3d 1242 (11th Cir. 1999) and *Bonanni Ship Supply, Inc. v. U.S.*, 959 F.2d 1558 (11th Cir. 1992).

The Fifth Circuit, in the case below, indicates someone other than the agent *could* have authority to bind the vessel. The Fifth Circuit's overly restrictive reading of the applicable statute, however, results in the deletion of and renders meaningless the provision relating to "persons entrusted" with the management of the vessel in the port of supply. It is hard to imagine that in the Fifth Circuit anyone but a traditional agent can ever create a maritime lien.

CONCLUSION

Petitioner requests that this Court address the split in the Circuits and require that the MCILA be construed in accordance with its plain language, Congressional intent and prior decisions of this Court.

Respectfully submitted,

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REVISED, JANUARY 24, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-30983

LAKE CHARLES STEVEDORES, INC

Plaintiff – Appellant

v.

PROFESSOR VLADIMIR POPOV MV, in rem

Defendant – Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana

December 23, 1999

Before KING, Chief Judge, and SMITH and STEWART, Circuit Judges.

KING, Chief Judge:

Plaintiff-Appellant Lake Charles Stevedores, Inc. appeals the district court's dismissal of its in rem proceeding against Defendant-Appellee, the Professor Vladimir Popov M/V, arguing that the court erred in determining that the stevedores had no maritime lien. We affirm.

I. FACTS & PROCEDURAL BACKGROUND

As is often the situation in transactions involving the shipping of goods, a number of different parties were at

least indirectly involved in the transaction at the heart of this case. Terms of the initially contemplated transaction were defined in January, 1997, when ED&F Man Sugar, Inc. ("Man Sugar"), a subsidiary of ED&F Man, Inc., agreed to purchase from Broussard Rice Mill, Inc. ("Broussard") 5000 metric tons of rice at $18.40 c.w.t. (price F.O.B. mill), for delivery some time between the last half of February and the first half of March. The purchase agreement indicates that the final contract price would include the cost of the bags to contain the rice, of freight from the mill to the dock, of unloading the trucks, and of stowing and trimming (i.e., stevedoring services). Adding the cost of these items to the base price for the rice alone ($18.40 c.w.t.) yields an anticipated final price of $20.05 c.w.t. The sale of 5000 tons of rice, under the same terms, was confirmed in a document Broussard sent to Man Sugar on February 3, 1997.

In part because Man Sugar could not secure a vessel by mid-February, delivery could not occur when originally expected. The contract was amended on March 24, 1997 to provide for 4600 (rather than 5000) tons of rice at $20.05 c.w.t., delivery F.O.B. vessel sometime in early April. The contract price again included stevedoring, with no change in the $.90 c.w.t. cost. Man Sugar also agreed to make progress payments of $19.15 c.w.t. when loads of 1500 tons reached the dock in order to prevent Broussard from having to carry the costs associated with delay in delivery. The balance ($.90 c.w.t.) was due when full and complete shipping documents were presented.

Man Sugar was able to gain access to the Professor Vladimir Popov M/V (the "Vessel") in March 1997. Savannah Chartering Ltd., the disponent owner of the

Vessel, had time chartered the Vessel to Marine Trading, Ltd. ("Marine Trading") in June 1996. The charter party between Savannah Chartering and Marine Trading provided that

> [t]he Captain (although appointed by the Owners), shall be under the orders and direction of the Charterers as regards employment and agency; and Charterers are to load, stow and trim, and secure the cargo at their expense under the supervision of the Captain, who is to sign bills of lading for the cargo as presented, in conformity with the mate's or talley clerk's receipts.[1]

In a document dated March 20, 1997, Marine Trading voyage chartered the Vessel to Sugar Chartering, Inc., another subsidiary of ED&F Man. The charter party provided that stevedores were to be employed by Sugar Chartering. Sugar Chartering subchartered the Vessel to Man Sugar.

On April 24, 1997, freight forwarder Mary Reid of Reid & Company ("Reid"), acting on behalf of Broussard, asked Lake Charles Stevedores, Inc. ("LCS") to submit a bid for loading the rice. At the time Reid contacted LCS, it was told it would be working for Broussard. Reid also obtained an "all inclusive" bid from another stevedoring concern in the area. In order to assist in comparing the bids, Reid asked LCS to submit an all-inclusive bid. Although the first bid LCS submitted to Reid was copied

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[1] Under a rider clause, charterers, subcharterers, or their agents could sign bills of lading for and on behalf of the Master in conformity with the Mate's receipt.

to Broussard, the second bid was not. LCS' second bid noted that the vessel's gear would be used unless it was slow, in which case LCS' shore gear would be used at LCS' expense. Broussard awarded the contract to load the Vessel to LCS. Reid relayed this information to LCS. LCS had often worked for Broussard in the past, generally unloading its trucks at the docks, but also loading ships under prior F.O.B. contracts.

During April, Broussard delivered the rice to the docks. After receiving confirmation that loads of rice had been delivered, Man Sugar made payments as per the parties' agreement. Lake City Steamship Agency ("LCSA"), a division within LCS, was hired by Marine Chartering, an agent of Marine Trading, to act as vessel agent. In this capacity, LCSA was responsible for coordinating the Vessel's movement in and out of port and meeting its requirements while in port. LCSA prepared the Notice of Readiness, indicating that the Vessel was in port and ready to be loaded, and transmitted it to Reid, who was also the local agent for Man Sugar, on April 30, 1997.

LCS loaded the Vessel on May 1, May 2, and May 5, 1997. The Vessel's mate or master signed LCS' Activity Sheets[2] and Mate's Receipt. A clean bill of lading was signed by LCSA for the Vessel's master. When it received the required shipping documents from Reid, Man Sugar made its final payment, in the amount of $90,761.78, to Broussard. This amount was described as stevedoring expenses in Man Sugar's accounts. LCS sent an invoice to

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[2] Activity sheets, necessary to issue a Mate's Receipt, described the work performed each day.

Broussard, but to no other entity, for the stevedoring services rendered. Although Broussard charged Man Sugar $18 per short ton of cargo for stevedoring services (or $.90 c.w.t.), LCS charged Broussard only $14 per short ton, yielding a total bill of $65,395.07. The difference in price was attributed by the district court to Broussard's acceptance of risk of loss due to weather conditions or other contingencies.

LCS had never had difficulty collecting on its accounts with Broussard. However, in this instance, the bill from LCS remained unpaid. On September 30, 1997, after LCS learned that Broussard had been put into receivership, LCS had the Vessel arrested in order to secure payment for the stevedoring services. ED&F Man and Sugar Chartering each filed claim for the Vessel.

The Vessel's claimants and LCS filed motions for summary judgment, each of which was denied. The case was tried without a jury on July 28, 1998. The district court held that LCS was not entitled to a lien because there was no contract between LCS and the charterers, there was no evidence that Broussard was the owner's or a charterer's agent, and the owner's or charterer's knowledge that LCS was apparently the stevedoring concern hired by Broussard to load the rice was insufficient to create a lien. LCS timely appeals.

II. STANDARD OF REVIEW

Because we face an admiralty case tried without a jury, we review the district court's legal conclusions de novo. *See Nerco Oil & Gas, Inc. v. Otto Candies, Inc.*, 74 F.3d 667, 668 (5th Cir. 1996). The district court's factual findings are

reviewed under the clearly erroneous standard. *See* Fed.R.Civ.P. 52(a); *Nerco*, 74 F.3d at 668. The clearly erroneous standard of review does not apply to factual findings made under an erroneous view of controlling legal principles. *See Delta S.S. Lines, Inc. v. Avondale Shipyards, Inc.*, 747 F.2d 995, 1000 (5th Cir. 1984).

III. DOES LCS HAVE A MARITIME LIEN?

The purpose of maritime liens is "to enable a vessel to obtain supplies or repairs necessary to her continued operation by giving a temporary underlying pledge of the vessel which will hold until payment can be made or more formal security given." *Southern Coal & Coke Co. v. F. Grauds Kugniecibas ("The Everosa")*, 93 F.2d 732, 735 (1st Cir. 1938); *see also Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 9 (1920) ("Since she is usually absent from the home port, remote from the residence of her owners and without any large amount of money, it is essential that she should be self-reliant – that she should be able to obtain upon her own account needed repairs and supplies."); *A.L. Veverica v. Drill Barge Buccaneer No. 7*, 488 F.2d 880, 883 (5th Cir. 1974) ("The very purpose of maritime liens is to encourage necessary services to ships whose owners are unable to make contemporaneous payment.").[3] They are largely statutorily

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[3] Although credit to the vessel remains a fundamental concept underlying the maritime lien, *see Equilease Corp. v. M/V Sampson*, 793 F.2d 598, 605 (5th Cir. 1986) ("*Equilease II*"), it is no longer the case that a claimant providing necessaries on the order of one with authority to procure them must prove that credit was given the vessel in order to establish a lien. *See*

created. *See In re Admiralty Lines, Ltd.*, 280 F. Supp. 601, 604-05 (E.D. La. 1968) ("[A]dmiralty law has long ago ceased to create new liens. The only liens recognized today are those created by statute and those historically recognized in maritime law."). Thus, in order to resolve the issues raised in this case, we must look to the Maritime Commercial Instruments and Liens Act ("MCILA"), 46 U.S.C. § 31301 et seq., which defines the circumstances under which a party is entitled to a maritime lien.

In brief, the MCILA states that a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner has a maritime lien on the vessel, *see* § 31342(a),[4] unless the provider of the necessaries has waived its right to the lien. *See* § 31305. Section 31341(a) lists entities presumed to have authority to procure necessaries: (1) the owner; (2) the master; (3) a person entrusted with the management of the vessel at the port of supply; or (4) an officer or agent appointed by

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§ 31342(a)(3); *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 12 (1920) ("The act relieves the libelant of the burden of proving that credit was given to the ship when necessaries are furnished to her upon order of the owner. . . . ").

[4] Under § 31342(a),

> Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner –
>
> (1) has a maritime lien on the vessel;
>
> (2) may bring a civil action in rem to enforce the lien; and
>
> (3) is not required to allege or prove in the action that credit was given to the vessel.

46 U.S.C. § 31342(a).

the owner, a charterer, an owner *pro hac vice*, or an agreed buyer in possession of the vessel. An element common to these entities is that they may be presumed to have authority to procure necessaries on the vessel's account. *Cf. Ferromet Resources v. Chemoil Corp.*, 5 F.3d 902, 904 (5th Cir. 1993) ("The ship's master or other person, such as a charterer, to whom the vessel is entrusted is presumed to have authority to purchase necessaries to the credit of the vessel.").[5] The presumption created in § 31341 is not

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[5] That § 31342(a) and § 31341(a) refer to authority to procure necessaries *on the vessel's account* is also reflected in the law the MCILA replaced in 1988, the Federal Maritime Lien Act, 46 U.S.C. § 971 et seq., and in the 1971 amendments to that Act. Under the pre-1971 version of § 973 of the Federal Maritime Lien Act,

> [t]he officers and agents of a vessel specified in section 972, shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel; but nothing in this chapter shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without *authority to bind the vessel therefor*.

(emphasis added). The 1971 amendments eliminated all language after the semicolon in order to remove from suppliers the obligation to investigate whether the entity ordering necessaries was, in fact, with authority to bind the vessel. *See Atlantic & Gulf Stevedores, Inc. v. M/V Grand Loyalty*, 608 F.2d 197, 201 (5th Cir. 1979). This created a statutory presumption that certain entities (those listed in § 972 and the remaining portion of § 973) had authority to bind the vessel. The MCILA maintains that presumption, with the entities now all listed in § 31341(a).

conclusive, *see Marine Coatings v. United States*, 932 F.2d 1370, 1376 (11th Cir. 1991), and thus can be rebutted by, for example, a showing that the provider of necessaries had actual knowledge of a no-lien clause that prevented the entity ordering those necessaries from binding the vessel. *See Belcher Oil Co. v. M/V Gardenia*, 766 F.2d 1508, 1512 (11th Cir. 1985); *Gulf Oil Trading Co. v. M/V Caribe Mar*, 757 F.2d 743, 749 (5th Cir. 1985). As a result, a supplier of necessaries ordered by a § 31341(a) entity subject to a no-lien clause not made known to the supplier has a maritime lien.

It is undisputed that stevedoring services are necessaries, and that LCS provided those services. The case thus raises two basic issues. The first issue is whether "the person who placed the order had authority to do so, either real, apparent, or statutorily presumed," i.e., whether LCS has a maritime lien. *Belcher Co. v. M/V Maratha Mariner*, 724 F.2d 1161, 1164 (5th Cir. 1984); *see also Atlantic & Gulf Stevedores, Inc. v. M/V Grand Loyalty*, 608 F.2d 197, 202 (5th Cir. 1979) ("Authorization, actual or fairly presumed, given prior to or during rendition of

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Although the 1971 amendments made it easier for suppliers of necessaries to obtain liens, *see id.*, they did not alter the definition of "authority." *Cf. Jan C. Uiterwyk Co. v. MV Mare Arabico*, 459 F. Supp. 1325, 1329 (D. Md. 1978) (noting that the 1971 amendments to the Federal Maritime Lien Act did not eliminate the requirement that necessaries be procured by an entity with authority to do so). The definition of authority was also not changed when the MCILA was enacted. *See* H.R. REP. NO. 100-918, *reprinted in* 1988 U.S.C.C.A.N. 6108, 6129, 6141 (noting that no substantive change from prior law is intended in enacting the MCILA).

services, or ratified subsequent to rendition will suffice."). If LCS had a maritime lien, the second issue we must address is whether LCS waived its right to that lien.

LCS takes issue with both the findings of fact and the conclusions of law underlying the district court's determination that it was not entitled to a lien. LCS states that the findings of fact are clearly erroneous, and also argues that the standard applied to find that LCS relied only on Broussard's credit was improper. Further, LCS argues that, contrary to the district court's determination, it obtained a valid maritime lien because (1) Broussard had actual authority from the Vessel's owners; (2) Broussard had apparent authority; (3) the services it supplied were ratified by the master; and (4) it did not forgo its lien.

A. Authority – Real, Apparent, or Statutorily Presumed

The parties stipulated that Broussard made the final selection of LCS as the company to load the bagged rice onto the Vessel. If Broussard had authority to act on behalf of the Vessel when it employed LCS, then LCS has a maritime lien. *See* § 31342(a). Citing *Jan C. Uiterwyk Co. v. MV Mare Arabico*, 459 F. Supp. 1325 (D. Md. 1978), in support, LCS points to the nature of services supplied to argue that Broussard had actual authority from the Vessel's owners or charterers to engage LCS to supply stevedoring services. LCS notes that the *Jan C. Uiterwyk* court specifically recognized that "[a]rrangements for these [stevedoring] services must be made by the ship's master or someone authorized by him", 459 F. Supp. at 1330, and that "[i]t is hardly the responsibility of a mere shipper to

arrange for services necessary for a vessel to enter a port, to receive cargo and to leave the port." *Id.* at 1331. LCS traces the line of authority from the charter to Marine Trading to the charter to Sugar Chartering, noting that the authority to employ stevedores was passed on at each stage. LCS continues this line of reasoning to conclude that Broussard was authorized by the Vessel's owners to employ stevedores to board and load the Vessel because the authority could come from nowhere else. A similar "nature of service" argument is made in support of LCS' contention that Broussard had apparent authority to hire the stevedores.[6] Broussard is also argued to have been entrusted with the management of the Vessel at the port of supply because it employed LCS, a stevedoring concern. Further, LCS contends that Broussard was able to, and did authorize the use of the Vessel's gears when it accepted LCS' bid, which indicated that the Vessel's equipment could be used. In addition, LCS points to the legislative history of the 1971 amendments to the Federal Maritime Lien Act, 46 U.S.C. § 971 et seq., as supporting the notion that stevedores can presume that they have a lien when they supply services to a vessel.

The MCILA identifies in § 31341(a) the entities that can be statutorily presumed to have authority to procure

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[6] LCS also asserts that Reid had apparent authority to obtain stevedoring services, that Reid awarded the contract to LCS, and that she was a person entrusted with the management of the vessel at the port of supply, *see* § 31341(a), given her capacity as Man Sugar's local agent. Because we find no indication in the record that the district court's finding that LCS at all relevant times knew it was hired solely by Broussard is clearly erroneous, we must reject these arguments.

necessaries on the vessel's account. The presumption created in § 31341 is not a function of the services supplied – both § 31341 and § 31342 speak in terms of necessaries without further distinction.[7] Unless Broussard is one of the entities listed in § 31341(a), the statute does not allow for a presumption that it had authority to procure the necessaries on the ship's account simply because the necessaries provided were stevedoring services.

We must therefore undertake to determine whether Broussard qualifies as any of the entities listed in § 31341(a). Broussard is clearly not the owner of the Vessel, or its master. It is also not "a person entrusted with the management of the vessel at the port of supply." § 31341(a)(3); *see also Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.*, 310 U.S. 268, 279-80 (1940) (describing management as "a broader term connoting direction and control for the purposes for which the vessel is used" and finding a charterer to have been entrusted with the management of the vessel). In *Atlantic & Gulf Stevedores*, we found a chief officer to be a person to whom management of the vessel was entrusted, based on his position within the command hierarchy, his duties, which specifically included the direction and control of loading and unloading, and historic practice. *See* 608 F.2d at 200. There are no such indicators here. This was Man Sugar's first purchase

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[7] The MCILA separates stevedoring services from others in § 31301(5), which provides that a "preferred maritime lien" is one "(A) arising before a preferred mortgage was filed under section 31321 of this title . . . (C) for wages of a stevedore when employed directly by a person listed in section 31341 of this title." This provision is not applicable to the instant case.

of rice from Broussard. Broussard was contractually obligated to undertake the steps necessary to get the specified quantity of rice onto the Vessel. It was not entrusted with the management of the Vessel at the port of supply.

Whether Broussard is an agent appointed by Man Sugar, as subcharterer, is a somewhat closer question. In interpreting whether Broussard is an agent, we look to general principles of agency law, *see Marine Fuel Supply & Towing, Inc. v. M/V Ken Lucky*, 869 F.2d 473, 477 (9th Cir. 1989); *Cactus Pipe & Supply Co. v. M/V Montmartre*, 756 F.2d 1103, 1111 (5th Cir. 1985); *Esso Int'l, Inc. v. The SS Captain John*, 443 F.2d 1144, 1146 (5th Cir. 1971), and consider "the roles of the parties in the transactions." *Marine Fuel Supply*, 869 F.2d at 477. Unless the district court's findings regarding the existence of an agency relationship are clearly erroneous, we must accept those findings. *See Equilease v. M/V Sampson*, 756 F.2d 357, 363 (5th Cir. 1985) ("*Equilease I*") (en banc) ("The existence of any agency relationship is a question of fact which should not be reversed on appeal unless it is clearly erroneous.") (citing *Strachan Shipping Co. v. Dresser Indus., Inc.*, 701 F.2d 483, 487 (5th Cir. 1983)).

We assume that Man Sugar had authority to employ stevedores on the Vessel's account.[8] It is clear from the contract between Man Sugar and Broussard that

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[8] The terms of the subcharter between Sugar Chartering and Man Sugar do not include language expressly pertaining to procuring stevedoring services. Under § 31341(a), however, Man Sugar would be presumed to have authority to procure such services on the Vessel's account. *See Marine Fuel Supply*, 869 F.2d at 476 n.3 (noting that a subcharterer is treated as a charterer for purposes of the Maritime Lien Act).

Broussard was not given express authority to employ stevedores on behalf of the Vessel. The sales contract makes no reference to Broussard's acting as Man Sugar's agent.

Given the terms of the sales contract and the parties' actions under that contract, Broussard also did not have implied authority to procure stevedoring services on the Vessel's account.[9] Because the contract provided for delivery F.O.B. vessel,[10] title to the rice was to stay with

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[9] Much of LCS' argument in support of its contention that Broussard had "authority" to employ stevedores appears to rest on the assumption that because Broussard was able to employ an independent stevedoring concern, Broussard had the authority to employ stevedores on the Vessel's account. LCS argues that, given the circumstances, Broussard and Man Sugar anticipated that Broussard would employ an independent stevedoring concern and thus that Broussard had the authority under the sales contract to do so. We do not consider the ability to employ LCS as synonymous with the authority to employ LCS on the Vessel's account. *See* note 5 *supra*. Moreover, we view the expectation that Broussard would use an independent concern to load the rice as insufficient to grant to Broussard the authority to hire stevedores on the Vessel's account, and therefore reject the approach apparently taken in *Riedel Envtl. Servs., Inc. v. M/V Tula*, 1987 A.M.C. 2378 (S.D. Ala. 1987). *See* discussion of general contractor and middle-man cases *infra*.

[10] LCS uses this fact to argue that Broussard was given authority to hire stevedores. That the final contract price would include costs of loading the rice onto the Vessel, however, was a term of the agreement reached in January, 1997, before Man Sugar had access to a ship, let alone the Vessel. Although the contract was amended after Man Sugar became the subcharterer to the Vessel, the F.O.B. delivery term was not among the terms altered. Under these circumstances, it is difficult to find that the F.O.B. terms are responsible for transferring the requisite authority from Man Sugar to Broussard.

Broussard until loading was completed. Broussard was therefore responsible for loading its, not Man Sugar's, rice. The sales contract also set the cost for stevedoring services at $.90 c.w.t., with no allowance for delays or other contingencies. *Cf. South Carolina State Ports Auth. v. M/V Tyson Lykes*, 67 F.3d 59, 61 (4th Cir. 1995) (finding no agency relationship where subcontractor billed only the contractor, there was no contract between the subcontractor and the charterer, and under the agreement between the charterer and the general contractor, the charterer was to pay the contractor on a flat "pick-rate," i.e., per container, basis). Broussard thus agreed to shoulder the risk that actual stevedoring costs may have been greater than the amount owed by Man Sugar.[11]

The crux of LCS' "nature of services" argument appears to be that because stevedores must board a vessel in order to supply their services, authority to hire LCS must have passed from the Vessel's owners through all intermediate parties to Broussard. We must reject this argument. Man Sugar may have granted Broussard, and by extension, its employees, and its subcontractors permission to board. However, this does not translate to authority to employ stevedores on the Vessel's account. On brief, LCS characterizes the F.O.B. terms as Man Sugar's allocating to Broussard the responsibility for choosing,

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[11] For an example of a contractor incurring substantially greater costs than initially anticipated when the agreement between the contractor and the vessel's charterers was reached, see *Crescent City Marine, Inc. v. M/V Nunki*, 20 F.3d 665 (5th Cir. 1994). In that case, the contractor was paid $27,644.64 by the charterer, but was billed for $80,768.66 by the subcontractors. *Id.* at 667.

and paying, a stevedoring concern. There is no suggestion in the record that Man Sugar retained any control over Broussard's selection of stevedores, or over the price Broussard was to pay for actual stevedoring services rendered. Neither Broussard nor Reid approached Man Sugar with the stevedoring bids before LCS was selected. *Cf. id.* ("[I]t has not been shown that a court has found an agency relationship between an operator and a stevedore in the absence of contractual provisions or clear evidence of control and supervision by the operator."). In short, the district court did not err in concluding that Broussard was not the Vessel's agent.

LCS also argues that Broussard had apparent authority to procure stevedoring services. Because LCS testified that it did not know the identity of the company to which Broussard was supplying rice, but did know that a company separate from Broussard was involved in the transaction, Broussard's purported principal was partially disclosed. A partially disclosed principal may be liable if its actions before LCS led LCS reasonably to believe that Broussard was acting as its agent. *See Cactus Pipe*, 756 F.2d at 1111 ("Apparent authority is created as to a third person by conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to the act done on his behalf by the person purporting to act for him."); Restatement (Second) of Agency, § 159 cmt. e (1958) ("There may be apparent authority in the case of a partially disclosed principal. This is created where, by means of a document or other thing, the principal manifests that the agent is to act for whoever made the manifestation."); Restatement (Second) of Agency § 8 cmt. c ("Apparent authority exists

only to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized."). We must therefore assess whether the owner, Marine Trading, Sugar Chartering, or Man Sugar undertook actions that caused LCS reasonably to believe that Broussard was its agent.

The record shows limited contact between LCS and the Vessel's owner or charterers. LCS testified it did not know who owned the rice when it was loaded, and that no one told LCS that Broussard had the authority to commit another entity to the payment of stevedoring services. LCS sent invoices only to Broussard, and did not pursue alternate means of payment until after it learned Broussard went into receivership. The parties stipulated that prior to commencement of stevedoring services, the master provided instructions to LCS as to how the stevedoring was to be performed. The record contains a May 1 document signed by the Captain of the Vessel regarding the shoes the stevedores were to wear, their use of metal hooks, and what was to be done with damaged bags of rice. The crew opened and closed the Vessel's hatches for the stevedores. The mate or the master of the ship signed LCS' Activity Sheets and the Mate's Receipt. An agent of Marine Trading signed the bill of lading. Based on this evidence, the district court's finding that LCS had no reason to believe, and did not in fact believe that Broussard was acting on the Vessel owner's order when it retained LCS to load the rice was not clearly erroneous.

An important feature of the instant case is the absence of a contract between Man Sugar (or Sugar Chartering) and LCS. This is not an unusual set of circumstances facing a supplier of necessaries. There are two lines of cases that

deal with such circumstances: the general contractor/subcontractor line, *see, e.g., Galehead, Inc. v. M/V Anglia*, 183 F.3d 1242 (11th Cir. 1999); *Crescent City Marine, Inc. v. M/V Nunki*, 20 F.3d 665 (5th Cir. 1994); *Port of Portland v. M/V Paralla*, 892 F.2d 825 (9th Cir. 1989), *Integral Control Sys. Corp. v. Consolidated Edison Co.*, 990 F. Supp. 295 (S.D.N.Y. 1998); *South Carolina State Ports Auth. v. M/V Tyson Lykes*, 837 F. Supp. 1357 (D.S.C. 1993), *aff'd*, 67 F.3d 59 (4th Cir. 1995), and the principal/agent, or middleman, line of cases, *see Marine Fuel Supply & Towing, Inc. v. M/V Ken Lucky*, 869 F.2d 473 (9th Cir. 1989); *Tramp Oil & Marine, Ltd. v. M/V "Mermaid I"*, 805 F.2d 42 (1st Cir. 1986); *Belcher Co. v. M/V Maratha Mariner*, 724 F.2d 1161 (5th Cir. 1984).

Under the general contractor line, the general contractor supplying necessaries on the order of an entity with authority to bind the vessel has a maritime lien. *See Galehead*, 183 F.3d at 1245 (holding that contractor had lien and could recover for services performed by subcontractors); *Gulf Oil Trading*, 757 F.2d at 750-51 (finding general contractor who hired subcontractor to supply barge service had lien prior to having actual notice of a no-lien clause); *Ceres Marine Terminals, Inc. v. M/V Harmen Oldendorff*, 913 F. Supp. 919, 923 (D. Md. 1995) (holding that contractor had lien and could recover amounts attributable to services actually performed by subcontractors). However, subcontractors hired by those general contractors are generally not entitled to assert a lien on their own behalf, unless it can be shown that an entity authorized to bind the ship controlled the selection of the subcontractor and/or its performance. *See, e.g., South Carolina State Ports Auth.*, 67 F.3d at 61; *Port of Portland*, 892

F.2d at 828; *Farwest Steel Corp. v. Barge Sea-Span 241*, 828 F.2d 522, 526 (9th Cir. 1987). *But see Skandinaviska-Enskilda Banken v. C.L.C. Marine Servs., Ltd. (In re SeaEscape Cruises, Ltd.)*, 172 B.R. 1002, 1008 (S.D. Fla. 1994) (finding subcontractor had a lien without analyzing authority of contractor); *Riedel Envtl. Servs., Inc. v. M/V Tula*, 1987 A.M.C. 2378 (S.D. Ala. 1987) (holding plaintiff, a subcontractor, had made out a prima facie case showing it was entitled to a lien in part because contractor was impliedly authorized to use subcontractors). Under the middle-man line of cases, despite what can be a large number of intermediaries, the ultimate supplier of the necessaries may obtain a maritime lien under certain circumstances. *See, e.g., Marine Fuel Supply*, 869 F.2d at 477.

LCS argues strenuously that LCS, not Broussard, is a general contractor, and that Broussard is a middle-man. The sales contract between Man Sugar and Broussard merely allocated to Broussard the responsibility for identifying and paying the stevedores. The primary distinguishing characteristic between a general contractor and a middle-man that LCS identifies is that a general contractor can be expected to supply the necessary itself, whereas a middle-man is not expected to do so. According to LCS, because Broussard, as a rice mill, could not be expected to supply stevedoring services itself, it was a middle-man and not entitled to a lien. Instead, LCS, as the actual supplier of the necessaries, has the lien.

A review of the so-called middle-man cases does not reveal, contrary to what LCS suggests, that the actual deliverer of necessaries to the vessel is the entity entitled to a lien in every instance. For example, the court in *Exxon Corp. v. Central Gulf Lines, Inc.*, 780 F. Supp. 191

(S.D.N.Y. 1991), taking note of the Supreme Court's view of the circumstances of the case, *see Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 612-13 (1991), held that the party contractually obligated to supply the fuel (Exxon) was entitled to a lien, despite the fact that it had caused another supplier to actually deliver the ordered fuel to the vessel. *See* 780 F. Supp. at 194.

A similar result was obtained in *A/S Dan-Bunkering Ltd. v. M/V Zamet*, 945 F. Supp. 1576 (S.D. Ga. 1996). Dan-Bunkering, which had a contract with the charterer to supply the necessaries, contacted a broker, which in turn caused two other independent firms to deliver the necessaries to the vessel. The court found that Dan-Bunkering was entitled to a lien. *Id.* at 1579. Moreover, although the parties viewed the two firms actually delivering the necessaries as entitled to the lien, the court thought it "conceivable" that this was not the case, citing *Bonanni Ship Supply, Inc. v. United States*, 959 F.2d 1558, 1565 (11th Cir. 1992), a "general contractor" case, in support. *Id.* Under general contractor cases, the actual deliverer of necessaries often is not entitled to a lien. *See, e.g., Galehead*, 183 F.3d at 1245 ("[A]lthough Polygon did not physically supply the bunkers, a party need not be the physical supplier or deliverer to have 'provided' necessaries under the statute.").

In two of the cases LCS cites in support of its middle-man argument, the court suggested that the actual deliverers of the necessaries would be entitled to liens. *See Tramp Oil & Marine*, 805 F.2d at 44 ("No one disputes that Exxon and Colonial, as direct suppliers to the Mermaid, would be entitled to a maritime lien."); *Belcher*, 724 F.2d at 1163 ("Thus, when Belcher supplied fuel to the [vessel], a maritime lien may have arisen by operation of law. . . . ");

id. at 1164 ("If American law had been applicable when the vessel was attached in the Netherlands, the supplier of fuel would have had a lien on the vessel. . . . "). However, it was not necessary for these courts to consider whether Exxon, Colonial, or Belcher had a maritime lien under U.S. law, and thus we need not consider ourselves bound by these statements. *Cf. Crescent City Marine*, 20 F.3d at 670 (noting that language from *Belcher* relied on by party was dicta).

In the final case cited by LCS, *Marine Fuel Supply & Towing, Inc. v. M/V Ken Lucky*, 869 F.2d 473 (9th Cir. 1989), a subcharterer's managing agent, acting on the subcharterer's orders and instructions, contacted a firm it was authorized to order fuel through, which in turn instructed another firm to place the order for the vessel's supplies with Marine Fuel. Marine Fuel was subsequently notified that it had been nominated by the vessel's owner to supply the vessel. It was also notified of the identity of the vessel's husbanding agent, which arranged for delivery of the necessaries. Marine Fuel supplied the fuel, which the master of the vessel accepted. The court found that the order originated from the subcharterer, who had authority to bind the vessel, and that, under the circumstances, Marine Fuel was entitled to a lien. With the exception of the master's acceptance of the necessaries, LCS can point to no similar circumstances here.

We are persuaded by our review of these cases that it is not whether an intermediary can be expected to supply the necessaries itself that distinguishes instances in which the actual suppliers have liens, but it is rather the nature of the relationship between each pair of entities that are

involved in the transaction at issue (*e.g.*, agent vs. independent contractor). We view the facts of the instant case as more akin to those in which general contractors have been engaged to supply a service and have called upon other firms to assist them in meeting their contractual obligations. Had Broussard not delivered the rice in accordance with the sales contract's terms, it would have been liable for breach. As noted above, Man Sugar retained no control over the selection of a stevedoring concern, and Broussard accepted all the risk associated with the occurrence of events that would increase the costs of stevedoring services beyond what the sales contract provided. Simply put, Broussard was obligated to provide for the delivery of rice onto the Vessel, but was not authorized to act on behalf of Man Sugar in procuring stevedoring services.

Whether a contractor could be expected to hire subcontractors has been considered in assessing whether the subcontractors have liens. *See Galehead*, 183 F.3d at 1246 (noting that contractor was seemingly capable of performing under its agreement without resort to subcontractors); *Stevens Technical Services, Inc. v. United States*, 913 F.2d 1521, 1534 (11th Cir. 1990) (noting that the owner knew contractor was incapable of doing the work itself). However, decisions have generally not suggested that such an expectation is sufficient to grant the requisite authority. The Stevens court, for example, also noted that the contract with the general contractor listed the subcontractor, the general contractor refused to take responsibility for subcontractor's work, and that the vessel's operators dealt with subcontractor representatives in discussing, testing, and inspecting the subcontractor's work.

See id. at 1534-35. Other courts have seemingly ignored evidence suggesting that the vessel's owners or charterers were aware that a subcontractor would be used, *see, e.g., Crescent City Marine*, 20 F.3d at 668, and even that a particular subcontractor would most likely be used. *See, e.g., South Carolina State Ports Auth.*, 67 F.3d at 60 (noting that the subcontractor was the only entity that possessed the equipment necessary to perform the work); *Port of Portland*, 892 F.2d at 828 ("The most the Port has shown is the fact that it was most likely, even perhaps rather certain, that Northwest would choose the facilities of the Port when it did its work.").

In keeping with the notion that subcontractors may acquire liens where the vessel's owners retain control over their selection and/or performance,[12] the Ninth and Second Circuits require that an entity with authority to bind the vessel *direct* that the general contractor hire a particular subcontractor in order for that subcontractor to be entitled to a lien. *See Port of Portland*, 892 F.2d at 828; *Farwest*, 828 F.2d at 526; *Integral Control Sys.*, 990 F. Supp. at 301. In other cases in which subcontractors have been found to be entitled to a lien, those subcontractors were identified and accepted by the vessel's owner or charterer prior to performance. *See Stevens*, 913 F.2d at 1525, 1534;

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[12] The connection to principal/agent concepts is clear. This has been the connection for some time. *See The Juniata*, 277 F. 438, 440 (D.Md.1922) ("The cases in which a so-called subcontractor has been held entitled to a lien or a right in the nature of a lien against the ship appear all to have been cases in which, upon the facts, it was possible reasonably to hold that he was not a subcontractor at all, but had an agreement with the owner, made through the contractor as the owner's agent. . . . ").

Turecamo of Savannah, Inc. v. United States, 824 F. Supp. 1069, 1072 (S.D. Ga. 1993). Owner involvement in directing, testing, and/or inspecting subcontractor performance has also been cited in support of finding a lien in favor of a subcontractor. *See Stevens*, 913 F.2d at 1535; *cf. Marine Coatings*, 932 F.2d at 1375 n. 9 (listing operator's inspecting subcontractor work and giving provisional and final acceptance to work performed by the subcontractor among evidence that supported court's conclusion that a genuine issue of fact existed regarding general contractor's authority to bind the vessel). Based on these cases, we agree with the district court that LCS has not shown it was entitled to a lien under the circumstances presented here.

It is possible that § 31341 allows entities other than those listed to be proved to have authority to order necessaries on behalf of the vessel. *See Marine Coatings*, 932 F.2d at 1376. However, our respect for the principle of *stricti juris* prevents us from holding that a supplier of rice that is party to an F.O.B. vessel contract has been given the authority, by virtue of that contract, to employ the stevedores on the Vessel's account. *Cf. Atlantic & Gulf Stevedores*, 608 F.2d at 200-01 ("[M]aritime liens are to be strictly construed, i.e., they are not to be lightly extended by construction, analogy, or inference. . . . "); *Integral Control Sys.*, 990 F. Supp. at 301 (assessing whether the Eleventh Circuit's approach in contractor/subcontractor cases should be adopted, and deciding against doing so given the Second Circuit's commitment to a *stricti juris* approach to maritime liens).

B. Ratification

LCS argues that the actions on the part of the master of the Vessel operated to ratify its providing stevedoring services and thereby to bind the Vessel. A large portion of its ratification argument rests on the absence of any objection on the part of the Vessel's agents to LCS boarding the Vessel, and on its contention that the Vessel's awareness that LCS was supplying the necessaries is sufficient under the MCILA to constitute authorization. The evidence that LCS looks to as supporting its ratification arguments includes: LCS was provided instructions prior to loading the Vessel; the Vessel's hatches were opened and closed for the stevedores by the crew; the mate or the master of the ship signed LCS' Activity Sheets, and the Mate's Receipt; the stevedores were allowed on board without objection; and they used the Vessel's gear; and the crew, not Broussard, supervised the loading operation.

Much of this evidence reduces to a showing that the master of the Vessel allowed LCS on board to perform stevedoring services and accepted those services. Under the contract between Man Sugar and Broussard, Broussard was obligated to deliver the rice free-on-board the Vessel. Had the Vessel's agents not allowed the stevedores to load the rice, they would have prevented Broussard from fulfilling its contractual obligations. Under these circumstances, we are hesitant to declare that the Vessel's agents subjected the res to liability for stevedoring services necessary to enable Broussard to deliver the rice as per its agreement with Man Sugar.

As the district court noted, awareness on the part of the Vessel's agents that LCS was apparently the firm chosen by Broussard to load the rice is insufficient under the MCILA to constitute authorization. *See Galehead*, 183 F.3d at 1246 ("That a charterer of a vessel becomes aware that some work performed was by a party somewhere down the chain of contracting and re-contracting does not give rise to a maritime lien."); *Port of Portland*, 892 F.2d at 828 ("It cannot be denied that [the vessel's owner] knew that [the general contractor] was using the Port's facilities, but that has never been held to be sufficient to establish a lien."). A holding that awareness that necessaries are being supplied was sufficient, even though those necessaries were procured by an entity without authority to bind the vessel, would render the statute's authority requirement meaningless.

We must also reject LCS' contention that acceptance of LCS' services and the rice aboard ship provided the necessary authorization to entitle it to a lien. It is a settled principle of contract law that a contract requiring A to supply X to C is satisfied if B, hired by A, provides X to C. *See Galehead*, 183 F.3d at 1245 (citing Restatement (Second) of Contracts § 318 cmt. a, illus. 2 in support of its holding that a contractor provided necessaries to a vessel when the contractor's subcontractor delivered fuel to the vessel). Under the circumstances here, the delivery of the rice, though performed by LCS, is attributed to Broussard. Acceptance of the rice on the part of the Vessel, through signing of Activity Sheets and the Mate's Receipt, was therefore acceptance of Broussard's rice and Broussard's delivery of that rice. *See Galehead*, 183 F.3d at 1245; *Ceres Marine Terminals*, 913 F. Supp. at 923. As a

result, we do not view the activities on the part of the Vessel's master and crew to constitute ratification.

The cases LCS cites in support of its ratification argument are distinguishable. In *Yacht, Mary Jane v. Broward Marine, Inc.*, 313 F.2d 516 (5th Cir. 1963), the "real" captain did not object while work ordered by the "nominal" captain was going on. The nominal captain had no actual authority to place orders. We affirmed the lower court's conclusion that this supported a finding of implied authorization. Had the case been brought under the Federal Maritime Lien Act, the nominal captain would no doubt have been viewed as clothed with presumed authority to bind the vessel, having been named the "master" and appointed by the owner of the vessel. *Cf. Port of Portland*, 892 F.2d at 827 (citing *Yacht, Mary Jane* as an example of courts finding implied authority in individuals listed in § 972). The *Jan C. Uiterwyk* court found that the vessel's charterer and master approved of the use of JCU, a firm providing agency and terminal services, authorized JCU firm to sign bills of lading on behalf of the master and/or owner, and ordered services directly from JCU. LCS can point to no similar actions on the part of the charterers, the master, or the crew here.[13]

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[13] Although a stevedoring concern was also a plaintiff in this case, it may be argued that the finding that JCU was accepted as ship's agent was crucial to the stevedores being entitled to a lien. JCU had either supplied, or procured, all the services at issue in the case. *See Jan C. Uiterwyk*, 459 F. Supp. at 1327.

Because we find that the district court was correct in holding LCS was not entitled to a maritime lien, we need not consider the waiver issue.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's dismissal of LCS' in rem action against the Vessel.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

LAKE CHARLES STEVEDORES, INC.	*	CIVIL ACTION
	*	NO. 97-3053
VERSUS	*	SECTION D (1)
M/V PROFESSOR VLADIMIR POPOV, *in rem*	*	
	*	

This matter was tried to the court without a jury on July 20, 1998. Now, after considering the evidence, the memoranda of counsel, the applicable law, and having assessed the credibility of the witnesses at trial, the court renders the following opinion.

BACKGROUND FACTS

In this case plaintiff has filed an *in rem* complaint seeking recognition of a maritime lien against the M/V PROFESSOR VLADIMIR POPOV. Marine Trading, Ltd. (Marine Trading) was the disponet [sic] owner of the vessel at all times relevant to this suit. Marine Trading voyage chartered the vessel to Sugar Chartering, a subsidiary of ED & F Man. ED & F Man Sugar (Man Sugar) was also a subsidiary of ED & F Man.

In January of 1997, Man Sugar purchased approximately 5000 tons of rice from Broussard Rice Mill, Inc. (Broussard). The original terms included a cash purchase price of $18.40 c.w.t. (per hundred pounds), delivery F.O.B. mill, and an expected shipping date between the last half of February and the first half of March.

Delivery did not occur when expected and, on March 24, 1997. the contract was amended to the following pertinent terms: 4600 tons of rice at $20.05 c.w.t., F.O.B. vessel. This on board price included the stevedoring and other miscellaneous costs. Because the sale had been delayed, Man Sugar agreed to make progress payments to Broussard of $19.15 c.w.t. as incremental loads of 1500 tons reached the dock. The balance owed was to be settled upon the presentation of full and complete shipping documents.

In April, 1997, Mary Reid, a freight forwarder acting on behalf of Broussard, asked Lake Charles Stevedores, Inc. (LCS) to submit a quote for loading the Broussard rice purchased by Man Sugar. In that conversation LCS was told that LCS would be working for Broussard, a customer for whom LCS had worked in the past.

LCS was unaware at this time who was Broussard's customer nor was it told that Broussard had authority to commit any other party on the contract. LCS had done business with Broussard for many years and had never had trouble collecting on its accounts with Broussard.

Per agreement, Man Sugar paid Broussard $19.15 c.w.t. as incremental loads of 1500 tons reached the dock. As of April 16, 1997, the only remaining amount due Broussard was $ 90,761.78, its charge to Man Sugar for the stevedoring services.[1] Upon receipt of the port log

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[1] While Broussard charged and was paid by Man Sugar $18 per short ton of cargo for the stevedoring services, Broussard was charged only $14 per short ton by LCS. This surcharge was to cover any demurrage or other unforeseen event because,

statement of facts from the freight forwarder Reid & Co., which statement confirmed that the loaded vessel sailed on May 5, 1997, Man Sugar paid Broussard by wire transfer (on May 8, 1997) the invoice balance of $90,761.78. On May 12, 1997, after loading was complete, LCS sent an invoice in the amount of $65,395.07 to Broussard for the stevedoring services rendered.

The court finds, from the beginning of this transaction and throughout, that LCS knew it was hired solely by Broussard and only relied on Broussard's credit. LCS had no reason to believe and did not in fact believe that Broussard was acting on the order of the vessel owner when it retained LCS to load the rice on the vessel.

The evidence reflects that there were only two very limited instances of direct contact between Marine Chartering and Lake City Steamship Agency (an arm of LCS that shares office space with LCS and provides vessel agency services for vessels calling on the Port of Lake Charles). The first contact occurred on May 2, 1997 when Lake City advised Marine Chartering of the proposed overtime costs of stevedoring services. The opportunity to pay or contribute to overtime costs is offered in the event other demand for the vessel requires expedited completion of the charter. Overtime was not authorized. The only other contact involved Lake City's billing of the customary vessel fees.[2] Neither of those two contacts can

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importantly, **risk of loss due to weather conditions or otherwise was borne by Broussard**.

[2] It is interesting to note that on June 10, 1997, the date Lake City billed the vessel fees to Marine Chartering, LCS's outstanding receivables related to this cargo of rice totaled

be reasonably construed to have suggested in any way that any one other than Broussard was responsible for the stevedoring charges for loading the Broussard rice.

The record is clear that neither Man nor its subsidiaries, Man Sugar and Sugar Chartering, nor Marine Trading had any connection to the hiring of LCS to perform the stevedoring services on the vessel. None of these entities received an invoice for the LCS services. Mary Reid secured the LCS services solely on behalf of and on authority from Broussard.

In July of 1997, when LCS contacted Broussard regarding the unpaid bill, it made no attempt to bill any other party. It was not until September 1, 1997, after LCS learned that Broussard Rice Mill, Inc. had been put into receivership, that LCS arrested the vessel in an attempt to secure payment of the stevedoring services.

ANALYSIS

In order to have a maritime lien on a vessel, plaintiff has to meet the criteria of 46 U.S.C. § 31342 which requires that the lien-claimant has provided "necessaries to a vessel on the order of the owner or a person authorized by the owner." No one disputes that stevedoring services are necessaries. The issue is whether they were procured by the owner or a person authorized by the owner. In the case at bar, these services were provided on

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$65,395.07, the cost of the stevedoring services billed to Broussard on May 12, 1997. However, there was no mention of the receivables related to the stevedoring charges when the vessel charges were billed.

order of Broussard Rice Mill which was neither the owner nor authorized by the owner. Nor is Broussard one of those parties whose authority to procure necessaries for the vessel is presumed under § 31341.

Just as in *The Port of Portland v. M/V Paralla*,[3] there is no evidence that Broussard was acting as agent of the owner. There was in fact no contract between LCS and the vessel interests. The best that can be said is that the vessel interests may have become aware during the loading process that LCS was apparently the stevedore retained by Broussard to load the rice. That knowledge alone is insufficient to confer a lien.[4]

Plaintiff does not have a valid maritime lien on the M/V Professor Vladimir Popov and accordingly, this *in rem* complaint is dismissed.

Judgment will be entered in favor of defendants and against plaintiff.

New Orleans, Louisiana, this 31st day of July, 1998.

/s/ A. J. McNamara
A. J. McNAMARA
UNITED STATES DISTRICT JUDGE

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[3] 892 F.2d 825 (9th Cir. 1989).

[4] *Id.* at 828.